LEE SEN LAN & ANOR.

v.

MAH KWEE HOCK

HIGH COURT MALAYA, KUALA LUMPUR
LIM BENG CHOON J
[CIVIL SUIT NO. F 1946 OF 1985]
25 JANUARY 1990

TORT: *Claim for damages by dependants of the estate of deceased persons - Right of contribution - Subsection 8(4), 10(1)(c) of Civil Law Act 1956 - Right of defendant to amend statement of defence.*

DAMAGES: *Subsections 8(4), 10(1)(c) of Civil Law Act 1956.*

On 7 December 1985 the plaintiff instituted an action against the defendant claiming damages for the benefit of the dependants of the deceased victims pursuant to s. 7 of the Civil Law Act 1956. In addition the plaintiffs also claimed damages for the benefit of the estates of the deceased victims under s. 8 of the said Act. On 26 February 1986 the defendant filed his statement of defence.

No further steps were taken by either party to take out the summons for directions or to set the case down for trial. On 21 July 1988 the defendant applied to amend his statement of defence to include a counterclaim against the estate of the first deceased victim for contributions pursuant to s. 10 of the said Act and O. 20 r. 5 of the Rules of High Court 1980.

The plaintiffs opposed the application on a number of grounds, but at the hearing of the application the only ground relied on by the plaintiff was that the defendant was barred by s. 8(3)(b) of the Civil Law Act 1956.

Held:

[1] It is clear that no one can institute any proceeding against the estate of a deceased person when the underlying cause of action in the proceeding is based on tort committed by the deceased person unless the proceeding has been commenced not later than the period stipulated in s. 8(3)(b) of the Civil Law Act 1956.

[2] Although the cause of action for contribution under s. 10(1)(c) of the said Act does not arise until judgment in this action, the claim for contribution is subsisting within the meaning of s. 8(4) of the said Act.

[3] The right of contribution under s. 10(1)(c) is a right *sui generis* conferred by statute and is not a cause of action in tort, therefore it is not barred by s. 8(3)(b).

[4] Any cause of action instituted by the plaintiffs here in tort cannot bar the right of the defendant's claim for contribution since the first deceased victim, had he been still living, might have been liable if he had been sued.

[5] The defendant has a right to amend his statement of defence to include a counterclaim for contribution against the estate of the first deceased victim.

[Order accordingly.]

Cases referred to:
Harvey v. R.G. O'Dell Ltd. & Anor. [1958] 1 All ER 657
Brambles Construction Pty. Ltd. v. Helmers [1965-1966] 39 ALJR 410

Legislation referred to:
Civil Law Act 1956, ss. 7, 8, (3)(b), (4), 10, (1)(c)
Law Reform Act 1934 (Miscellaneous Provision), ss. 1, (3), (4)
Law Reform Act 1935 (Married Women and Tortfeasors) 1935, ss. 6(1), (1)(c)
Rules of the High Court 1980, O. 20 r. 5
Workmen's Compensation Act 1925 [UK], s. 30(2)

For the plaintiffs - Rajendran; M/s. R.K. Nathan & Co.
For the defendant - Y.M. Tunku Farik Ismail; M/s. Azim, Ong & Krishnan

JUDGMENT

Lim Beng Choon J:

On 7 December 1985, the plaintiffs instituted this action against the defendant claiming damages for the benefit of the dependants of the deceased victims of a motor accident which took place on 9 August 1984. The dependency claim was made pursuant to s. 7 of the Civil Law Act 1956. The plaintiffs are also claiming for damages for the benefit of the estates of the deceased victims under s. 8 of the said Act.

The first plaintiff is the administratrix of the estate of the deceased victim, who was at the material time the rider of the motor cycle WAG 6119 ('the first deceased victim') which was involved in the accident. She was granted the letter of administration to administer the estate of the first deceased victim by the Court on 20 November 1984 and the grant was extracted on 26 June 1985. The second plaintiff was likewise the administrator of the estate of the deceased victim who was at the material time riding pillion on the said motor cycle WAG 6119 ('the second deceased victim') and the letter of administration was granted to him on 11 December 1984 and the extraction of the grant was made on 26 June 1985.

To appreciate the issue raised by the plaintiffs in his opposition to the defendant application to amend his statement of defence by altering it to include a counterclaim, a brief summary of the events leading to the present application of the defendant is necessary.

The writ of the plaintiffs together with their joint statement of claim was filed on 7 December 1985. In their joint statement of claim they alleged that the accident was caused solely by the negligence of the defendant and particulars of negligence on the part of the defendant were set out in para. 6 of the said statement of claim.

The defendant filed his statement of defence on 26 February 1986 and he alleged that the accident was caused wholly or in part by the negligence of the first deceased victim, the rider of the motor cycle WAG 6119.

No further steps were taken by either party to take out summons for directions or to set the case down for trial. Then on 21 July 1988 nearly 2½ years after the institution of the suit by the plaintiffs, the defendant applied to amend his statement of defence to include a counterclaim against the estate of the first deceased victim for contributions pursuant to s. 10 of the Civil Law Act 1956 and O. 20 r. 5 of the Rules of High Court 1980.

The plaintiffs opposed the application on a number of grounds but at the hearing of the application the only ground relied on and adverted to by the Counsel for the plaintiffs was that the defendant was barred by subsection (3)(b) of s. 8 of the Civil Law Act 1956 to institute the proposed counterclaim since that subsection says:

(3) No proceedings shall be maintainable in respect of a cause of action in tort which by virtue of this section has survived against the estate of a deceased person, unless proceedings against him in respect of that cause of action either:

(a) were pending at the date of his death; or

(b) are taken not later than six months after his personal representative took out representation.

Counsel for the defendant, however, submitted (if I have not misunderstood him) that since the claim for contribution was made pursuant to subsection (1)(c) of s. 10 of the Civil Law Act 1956 which he said allowed any tortfeasor to recover contribution from any other tortfeasor "who is or would if sued have been liable in respect of the same damage", the defendant's application was not caught by subsection (3)(b) of s. 8 of the Act as the action in the proposed counterclaim was not based on tort but the action was for contribution which was permitted under s. 10(1)(c) of the Act. The said subsection (1)(c) of section 10 reads:

10(1) Where damages is suffered by any person as a result of a tort (whether a crime or not):

(a) ...

(b) ...

(c) any tort-feasor liable in respect of that damage may recover contribution from any other tort-feasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tort-feasor or otherwise, so, however, that no person shall be entitled to recover contribution under this section from any person entitled to be indemnified by him in respect of the liability in respect of which the contribution is sought.

It is clear that from the opening sentence of subsection (3) of s. 8 of the Civil Law Act 1956 which says "No proceeding shall be maintainable in respect of a **cause of action in tort**" clearly indicates that no one can institute any proceeding against the estate of a deceased person when the underlying cause of action in the proceeding is based on tort committed by the deceased person unless the proceeding has been commenced not later than the period stipulated in para. (b) of subsection (3) of s. 8. The words which I have emphasized clearly placed a statutory injunction against the institution of an action in tort after the stipulated period.

In the application for amendment made by the defendant his proceedings is not grounded on any tort committed by the first deceased victim but rather for contribution based on the failure on the part of the first deceased victim, in his own interest to take reasonable care of himself and thereby contributed, by his want of care, to his own injury. The statutory right for contribution from a co-tortfeasor is therefor a right *sui generis*. This proposition is enunciated in *Harvey v. R.G. O'Dell Ltd. & Anor.* [1958] 1 All ER 657.

In that case the English High Court of the Queen's Bench Division was dealing *inter alia* with the scope of subsection (3)(b) of s. 1 of the Law Reform (Miscellaneous Provision) Act 1934 which is in *pari materia* with subsection (3)(b) of s. 8 of our Civil Law Act 1956 and s. 6(1) of the Law Reform (Married Women and Tortfeasors) Act 1935 which again is in *pari materia* with s. 10(1)(c) of our 1956 Act. To appreciate the principles enunciated in that case it is helpful to set out briefly the facts of that case. However I need only advert to so much of the facts that are pertinent and on which McNair J relied to support the principles enunciated by the learned Judge. The plaintiff and one Galway in that case were employed by the first defendants, who were builders and repairers of barges. Galway owned a motor cycle combination which he used from time to time for his employees' purposes. On 29

February 1952 Galway acting on the instructions of the defendants went to Hurley to do repair work, taking the plaintiff along with him. They travelled, as they were authorised to do in Galway's motor cycle combination. After they had worked for some hours, they went to Maidenhead (some 5 miles from Hurley) to get some tools and materials and to obtain some refreshments. While they were returning to Hurley in the motor combinations there was a collision between the motor cycle and a motor car due to the negligence of Galway. The plaintiff was injured and Galway was killed in the accident. On 24 May 1952 letters of administration of Galway's estate was granted to his widow; and accordingly no action for negligence could be brought against Galway's estate on or after 24 November 1952 *viz.*, the expiration of the six months' limitation period allowed by s. 1(3) of the Law Reform (Miscellaneous Provisions) Act 1934. In April 1954 the plaintiff commenced an action for damages against the first defendants alleging that Galway's employees were vicariously liable for his negligence. On 14 March 1955, the first defendants served a third-party notice on Galway's administratrix claiming contributions against Galway's estate under s. 6(1)(c) of the Law Reform (Married Women & Tortfeasors) Act 1935 in the event of their being held liable to the plaintiffs in damages. Upon holding that the accident was due to Galway's negligence and that the first defendants and Galway were in law joint tortfeasors McNair J, who tried that case, posed three questions as to (i) the nature of the right of contribution and (ii) whether the cause of action for contribution was maintainable against the administratrix of Galway's estate notwithstanding subsection (3)(b) of the Law Reform (Miscellaneous Provisions) Act 1934 and (iii) was there in the expression "who ... would if sued have been liable" any temporal connotation referring to time at which the hypothetical action must be assumed to have been brought? In answer to question (i) the learned Judge said at p. 699:

> In my judgment, it is plainly established on the authorities that the right of contribution between tortfeasors is a **right *sui generis* conferred by statute** similar to the right of contribution conferred by s. 30(2) of the Workmen's Compensation Act 1925; see *Littlewood v. George Wimpey & Co.* ([1953] 2 All ER 915); see also the same case on appeal in the House of Lords, *George Wimpey & Co. Ltd. v. British Overseas Airways Corp.* ([1954] 3 All ER 661) and *Post Office v. Official Solicitor* ([1951] 1 All ER 522). Furthermore, if the third-party proceedings themselves are not founded in tort, **they are not proceedings in respect of a cause of action in tort** within the meaning of s. 1(3) of the Act of 1934; the expression plainly means proceedings to enforce a cause of action in tort.
> (Emphasis is mine).

As to question (ii) the learned Judge said at the same page:

> In my judgment, it is also clear that the cause of action for contribution under the Act of 1935 did not arise until judgment in this action. I think that this conclusion is implicit, though not a matter of decision, in the speeches in the House of Lords in *Wimpey v. British Overseas Airways Corpn.* In *Post Office v. Official Solicitor* ([1951] 1 All ER at p. 525) Barry J held (it being common ground that a similar claim for contribution under s. 30(2) of the Workmen's Compensation Act 1925, did not arise until payment of compensation was made) that, notwithstanding that the payment was not made until after the death of the person from whom contribution was sought, the claim for contribution was subsisting against the deceased person at the date of his death within the meaning of s. 1(1) of the Act of 1934 by reason of the provisions of s. 1(4) of that Act.

It is significant to note that the s. 1(4) of the Law Reform (Miscellaneous Provisions) Act 1934 referred to by McNair J in his judgment is in *pari materia* with subsection (4) of s. 8 of our Civil Law Act 1956 which reads:

(4) Where damage has been suffered by reason of any act or omission in respect of which a cause of action would have subsisted against any person if that person had not died before or at the same time as the damage was suffered, there shall be deemed, for the purposes of this section, to have been subsisting against him before his death such cause of action in respect of that act or omission as would have subsisted if he had died after the damage was suffered.

And finally in his answer to question (iii) he said at p. 670:

In my judgment the phrase "who ... would if sued have been liable," If construed literally, contains no temporal connotation except that, for the institution of the hypothetical action, the words "would ... have been liable" plainly contemplate that the hypothetical action has been instituted at some time before the claim for contribution arose. This, as I have found, is the date of the judgment against the party seeking contribution. Literally construed, the phrase, in my judgment, means "who, if sued at any time, would have been liable" - that is, held liable.

Similar approach was adopted in the Australian case of *Brambles Construction Pty. Ltd. v. Helmers* [1965-1966] 39 ALJR 410.

With due respect I too would adopt the principle laid down in the *R.G. O'Dell Ltd.* case. Although the cause of action for contribution under subsection (1)(c) of s. 10 of the Civil Law Act 1956 does not arise until judgment in this action, the claim for contribution is subsisting within the meaning of s. 8(4) of the said Act. Secondly the right of contribution under s. 10(1)(c) of the said Act is a right *sui generis* conferred by statute and is not a cause of action in tort; therefore it is not barred by subsection (3)(b) of s. 8 of the said Act. Thirdly any cause of action instituted by the plaintiffs here in tort cannot bar the right of the defendant's claim for contribution since the first deceased victim had he been still living might have been liable if he had been sued. I used the words "might have been liable" guardingly for at this stage we could not ascertain the question of liability. We are only concerned with the right of the defendant to amend his statement of defence to include a counterclaim for contribution against the estate of the first deceased victim. In the premises I have no doubt that the defendant has a right to do so. The objection of the plaintiffs is therefore dismissed and I accordingly allow the defendant to amend his statement of defence in the manner sought by him in his application. Costs of this proceeding are to be paid by the plaintiffs to the defendant in any event.

Also found at [1990] 1 CLJ 925